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NO. 88-1747

MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM GRAMMER,
Petititoner

v.

PATTERSON SERVICES, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal appellate court has the power and duty to grant a judgment notwithstanding the verdict where the evidence presented precluded submission of an issue to the jury without denying petitioner rights guaranteed by the Seventh Amendment.

2. Whether the appellate court properly found respondent/principal did not have operational control over the functions of its independent contractor.

3. Whether appellate court properly denied petitioner's motion for new trial and directed judgment for respondent.

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STATEMENT OF THE CASE

Because of the nature of this writ, respondent suggests a brief factual outline is necessary.

Patterson Services, Inc., hereinafter referred to as respondent, is in the business of leasing oilfield drilling pipe to drilling companies. However, before the pipe can be let out it must meet certain structural and sealing standards dictated by the industry. Thus prior to any lease transaction the pipe must be tested to ensure its conformity with those standards. Gator Hawk was an ongoing concern that performed pipe testing by utilizing an automatic hydrostatic internal tester or AHIT. This machine

automatically plugs both ends of a joint of pipe, injects water or another fluid into the pipe bringing the internal pressure up to 18,000 psi. After the test is completed whether the pipe failed the test by bursting or it passed, the machine automatically reduces the pressure and disengages the plugs. As stated the test is to ensure the pipe has the structural integrity to withstand the pressure and to check the three seals at each end of the pipe. It was during such a test performed by Gator Hawk and its employees that the petitioner was unfortunately injured.

Sometime prior to the accident Gator Hawk was requested by respondent to test all three seals of each joint of Patterson pipe. Respondent did not request how this was to be performed nor were any of its employees involved with any of the testing procedures, this was strictly within the province of Gator Hawk. Gator Hawk complied with this request by tightening the plugs on the ends of the pipe so as to engage all three seals. On the date of the accident the AHIT was malfunctioning in that it could not properly grip the pipe to disengage the plugs. This information was not communicated to nor was respondent aware at all of the malfunction. However, instead of performing a five minute procedure to replace the grips, Gator Hawk instructed the petitioner to grip the pipe with a wrench after the water pressure was released. During the testing of one joint of pipe, petitioner approached the machine, wrench in hand, before the pressure was released. The pipe being tested did not meet industry standards and ruptured causing the petitioner's injuries.

Respondent avers and emphasizes the entire testing procedure was performed by Gator Hawk personnel only and only under Gator Hawk supervision. Considering all of the evidence presented the appellate court determined reasonable persons could not differ that Patterson had no control whatsoever over the operation and method of the

testing procedure. Respondent is not in the business of testing pipe and left the performance and decision making that is involved in the testing to the professionals, Gator Hawk.

Pursuant to local worker's compensation statutes, petitioner had no recourse against Gator Hawk (determined to be his statutory employer) and initiated this suit against Patterson. In desperation petitioner argues that by requesting the three seals on each pipe be tested respondent exercised significant control over the testing operation. Further, petitioner argues that the appellate court overstepped its bounds by determining that respondent had no operational control over the testing.

AGRUMENT OF LAW

The petitioner' argument is two fold; (1) the appellate court abused its inherent powers to grant a judgment notwithstanding the verdict by making a factual determination contrary to petitioner's rights; and (2) the appellate court erred in finding that Patterson did not have operational control over the testing.

POWER OF APPELLATE COURT TO RULE

Your petitioner argues that the appellate court made factual determinations that were "so deeply within the province of the jury that the Circuit Court's reversal was not merely judicial error, but a mistake of constitutional magnitude denying Grammer the jury trial and review guaranteed him by the Seventh Amendment." This allegation is synonymous with saying that Rule 50 of the Federal Rules of Civil Procedure is unconstitutional. As the Fifth Circuit Court of Appeals held in *Parfait v. Central Towing, Inc.*, 667 F.2d 1189 (CA 5th Cir. 1982):

"Yet we cannot accept Central Towing's assertion that all factual inferences are reserved for the jury alone. The mere existence of the motion for directed verdict, F.R.Civ.P. 50(a), undercuts the claim. Where the facts will allow but one conclusion or inference, a judge may properly remove the issue from the jury. As we stated in *United States v. Williams,* 441 F.2d 637, 644 (5th Cir. 1971), 'this Court does not demand jury consideration of an issue which is determinable by directed verdict'"

In addition this Court as well has held:

As far as the Seventh Amendment's right to a jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v.

Neely v. Martin K. Eby Construction Co., 386 U.S. 398, 87 S.Ct. 1072 (1967). Further, section 2106 of Title 28 states:

The Supreme Court or any other court of Appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and my remand the cause and direct entry of such appropriate judgment, decree, or require such further proceeding to be had as may be just under the circumstances."

SUBMISSION OF THE CASE

The determination remains as to when a factual ques-

tion can be removed from submission to the jury. This Court stated in *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077 (1943)

> "Finally, the objection appears to be directed at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist on 'substantial evidence' rather than 'some evidence' or 'any evidence,' or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases."

Galloway, 319 U.S., at 395; 63 S.Ct., at 1089.

Notwithstanding this Court's guidance that the evidence determination should be determined on a case by case situation, the Fifth Circuit outlined specific guidelines to assist in determining whether a factual question should not be submitted to the jury in *Boeing Company v. Shipman*, 411 F.2d 365, 373 -377 (CA 5th Cir. 1969). Citing this Court and numerous others the *Boeing* court stated:

> "On motions for directed verdict and for judgment not-withstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion

> is proper. . . A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

The Circuit Court's opinion in the above captioned matter clearly states that:

> "Having viewed the evidence as a whole, we conclude that Patterson's directions merely designated the type of test to be conducted rather than the method to conduct it."

Grammer v. Patterson Services, Inc., 860 F.2d 641, (CA 5th Cir. 1988). This clearly shows that the Circuit Court did not deviate from its own standards set out in *Boeing*. Further, there was no conflicting evidence on this issue. The question was: does requesting an additional test amount to operational control over the method to conduct that additional test? The appellate court said and reasonable men could not differ in that result.

The petitioner also argues that the respondent had a duty to discover hazards or is presumed to know of dangerous conditions that arise during the work of an independent contractor. Your respondent submits that such a duty is delegated to a principal only where the principal is actively participating in the work taking place. *Wallace v. Oceaneering International*, 727 F.2d 427 (CA 5th Cir.

1984), *Tarlton v. Exxon,* 688 F.2d 973 (CA 5th Cir. 1973). Respondent also submits there must be some foreseeability on behalf of the principal and "in the absence of such foreseeability, there is no negligence." *Mayfield v. Wall Shipyard, Inc.,* 510 F.Supp. 605 (D.C. LA 1981). The lower court specifically found that your respondent had no knowledge that the AHIT was not working properly and the corollary to that is there was no way respondent could foresee that petitioner was would be directed by his employer to expose himself to a pressurized pipe.

PETITIONER'S MOTION FOR NEW TRIAL

Respondent submits that petitioner *HAD* the right to move for a new trial, F.R. Civ. P. Rule 50(d). That right, however, was exercised and ruled upon by the Ciruit Court. In *Neely,* supra, this Court stated that an appellate court has the right to direct a judgment where it has granted a judgment n.o.v. The court in *O'Neil v. W.R. Grace & Co.,* 410 F.2d 908 (CA 5th Cir. 1969), held that the occasion where a verdict is against the weight of the evidence it is a situation where the jury did not properly perform its function. If no other reasons are present to grant a new trial such as introduction of inadmissible evidence or no other such "undersirable or pernicious element" has occurred, then a new trial should be denied. Also, when the sufficiency of the evidence is against the verdict of the jury then the appellate court can rule on the case where "no useful purpose can be served by presenting the same evidence to another jury." *Commercial Union Insurance Co. v. International Flavors & Fragrances, Inc.,* 822 F.2d 275 (CA 5th Cir. 1987). Since the petitioner has presented no additional evidence either at the appellate level or before this Court, the ruling denying his motion should be sustained.

CONCLUSION

In the matter before this Court the issues are narrowed down to whether respondent had sufficient operational control over petitioner's work as an employee of Gator Hawk. There was little dispute in the facts on this issue. The only dispute is the legal significance of a request of an additional test by respondent on its pipe. Your respondent contends and the appellate court found this was not operational control of Gator Hawk's testing methods. However, in an act of desperation the petitioner is trying to convince this Court it is. The petitioner is attempting to cloud the issue with Seventh Amendment arguments. The appellate court properly exercised its powers where the jury did not properly carry out its function. The petitioner has not provided any additional evidence nor has he shown that a new trial should be granted for any other reason. Further, respondent submits the petitioner has not outlined, argued or made any reference to this Court that any of his reasons why this Court should grant his writ conform in any way to the character of reasons set forth in U.S. Sup. Ct. Rule 17, 28 U.S.C. Therefore, Grammer's Petiton for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should respectfully be denied.